

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 11, 2007 Session

STEPHANIE JAN CLIFTON SOLIMA v. DAVID JOHN SOLIMA

**Direct Appeal from the Circuit Court for Williamson County
No. 04229 Russell Heldman, Judge**

No. M2006-01987-COA-R3-CV - Filed April 8, 2008

After a lengthy and acrimonious divorce proceeding, the trial court awarded the wife a divorce on the grounds of inappropriate marital conduct. The court divided the marital estate, awarded transitional and alimony *in solido* to the wife, and designated the wife as the primary residential party with the primary decision making responsibilities. The trial court further awarded wife attorney fees of \$75,000 “in the nature of alimony and also to some extent in the nature of child support.” The husband appeals, raising 12 issues.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Vacated in Part and Remanded**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P. J. and FRANK G. CLEMENT, JR., J., joined.

Rebecca E. Byrd, Franklin, Tennessee, for appellant, David John Solima.

John J. Hollins Jr, and Vincent P. Wyatt, Nashville, Tennessee for appellee, Stephanie Jan Clifton Solima.

OPINION

Factual and Procedural Background

The parties were married October 4, 1999. This was the second marriage for each of the parties. The parties have one minor child by this marriage, A.J.S., born November 30, 2001. Husband is employed at General Motors and wife is an analyst with Health Info Technics. Both parties have college degrees.

Prior to the marriage, the parties entered into a Prenuptial Agreement dated September 29, 1999. The Agreement provided that husband “shall separately retain all rights” in the house at 1207 Haber Drive, including the present value of \$235,000 and the appreciation in said value. The

Prenuptial Agreement also provided for attorney fees in the event it became necessary for either party to institute or defend legal proceedings to enforce the Agreement.

After the birth of their minor child, the wife desired to stay at home with the child, but the husband insisted that she continue her employment. The marital relationship deteriorated during the next several years. On May 14, 2004, the wife filed a complaint for divorce. On July 21, 2004, an Order of Reconciliation was entered suspending the divorce proceeding for six months. The reconciliation was a dismal failure, largely due to husband's efforts in surreptitiously video and audio taping the wife in an effort to portray her as an alcoholic. On February 11, 2005, husband filed a complaint for divorce which the trial court consolidated with the original complaint. A guardian ad litem was appointed on March 28, 2005, to make recommendations regarding custody and visitation. Dr. Jay Woodman, a custody and visitation expert, was appointed on May 5, 2005, to render an opinion as to the appropriate residential parent for the minor child. On June 14, 2005, the trial court entered an Order providing that neither parent would be designated the primary residential parent pending the final hearing on the divorce. The Order prohibited either party from consuming alcoholic beverages in the presence of the minor child. The husband filed a Declaratory Judgment action on September 29, 2005, to enforce the Prenuptial Agreement. On February 6, 2006, the trial court entered an order confirming husband's rights to the home located at 1207 Haber Drive and its appreciation pursuant to the Prenuptial Agreement.

The divorce was tried on June 28-30, 2006. The wife was granted an absolute divorce from the husband on grounds of inappropriate marital conduct. The court designated the wife as the primary residential parent and primary decision maker and awarded the wife transitional alimony in the amount of \$1,000.00 per month for 36 months, and alimony *in solido* in the amount of \$20,000.00. The husband was ordered to maintain hospitalization, major medical, and dental insurance covering the wife for 36 months. As part of the division of the marital estate, the wife was awarded a judgment of \$30,000.00, and \$1,225.00 for damage to her personal property caused by the husband. The court awarded attorney fees to the wife in the amount of \$75,000.00 as additional alimony *in solido* and child support. The trial court denied husband's claim for attorney fees associated with the enforcement of the Prenuptial Agreement. The husband was ordered to pay a Bank One Visa debt. Finally, the trial court enjoined the husband from making false reports about the wife to law enforcement.

The husband appeals from the trial court's rulings. In addition, husband asserts that it was error for the trial court to deny his motion to recuse the trial court or preclude evidence, and the trial court's ruling that he was not a credible witness. The husband also alleges that it was error for the trial court to exclude certain audio and video tapes from evidence.

Standard of Review

Our review of the issues is governed by Tenn. R. App. 13(d). Under that standard, we review the findings of fact by the trial court *de novo* upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Because the trial

judge is in a better position to weigh and evaluate the credibility of the witnesses who testify orally, we give great weight to the trial court's finding on issues involving the credibility of witnesses. *Gillock v. Board of Professional Responsibility*, 656 S.W.2d 365, 367 (Tenn. 1983). Conclusions of law are not afforded the same deference. *Brock v. Brock*, 941 S.W.2d 896, 898 (Tenn. Ct. App. 1996).

I. ISSUE OF CREDIBILITY

The trial court found that husband was not a credible witness and stated as follows:

This case is decided by the credibility of the parties and witnesses. The Court specifically finds that Mr. Solima is not a credible witness. . . . The Court further finds that during the parties stipulated period of reconciliation in 2004 and 2005, Mr. Solima tried to prove that Ms. Solima was violating the Court's previous order prohibiting her consumption of alcohol in the presence of the minor child. Mr. Solima was secretly taping and spying on Ms. Solima during the stipulated [period of] reconciliation.

The trial court further found that the husband tried to set-up Ms. Solima for violating the court order; that husband made false claims to law enforcement about the wife and that the claims that wife was an alcoholic or consuming alcoholic beverages were false. Other witnesses accredited by the trial judge refuted the assertion that wife was an alcoholic or drank in excess. At one point in the proceeding, the court admonished the husband for an attempt to coach a witness. The trial court observed the manner and demeanor of the husband for a three-day trial. After a review of the record, the trial court findings on credibility are affirmed.

II. MOTION TO RECUSE

On May 15, 2006, husband filed a Motion to Recuse or To Preclude Evidence. This Motion was filed almost one year after the trial court, sitting by interchange, signed an Agreed Order dated June 25, 2005. A hearing on the motion to recuse was conducted on June 6, 2006. The basis for the request for recusal was that the husband had consulted with the trial court in 1995 and disclosed confidential information to him about a custody issue arising out of his first marriage and subsequent divorce. This discussion occurred while the trial judge was in private practice. The husband was not present for the hearing on this motion nor was any offer of proof presented regarding the information that was disclosed at this 1995 meeting. The trial judge stated explicitly that he had no memory of this meeting nor did he remember the husband.

A judge should grant a motion to recuse if the judge's impartiality might reasonably be questioned. Tenn. Sup. Ct. R. 10 Canon 3E(1). A motion to recuse should be granted if the judge has any doubts as to his or her ability to preside impartially in the case. Thus, even when a judge believes that he or she can hear a case fairly and impartially, the judge should grant the motion to

recuse if the judge's impartiality might reasonably be questioned. Tenn. Sup. Ct. R. 10 Canon 3E(1). Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the judicial system as actual bias. *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994); *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560 (Tenn. 2001). Decisions concerning whether recusal is warranted are addressed to the judge's sole discretion. *State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995). The trial court's refusal to recuse is reviewed as an abuse of discretion. *Baker v. Hopper*, 50 S.W.3d 463, 467 (Tenn. Ct. App. 2001).

The trial court had no memory of the alleged meeting with husband. Even assuming there was a meeting, any information disclosed would have been ten years old and not related to these proceedings. Accordingly, we do not find that the trial court abused its discretion in denying husband's motion to recuse.

Husband complains about various statements and comments made by the trial judge during the proceedings that would lead an ordinary person to reasonably question the trial judge's impartiality. It is the duty of the trial judge not to "give any expression to any thought or to infer what his opinion would be in favor or against either of the parties at trial." *Leighton v. Henderson*, 414 S.W.2d 419, 420 (Tenn. 1967). The trial judge did engage in numerous instances with comments and questions directed to the husband. However, at no time during those exchanges did the husband request a recusal. A party may lose a right to challenge a judge's impartiality if they do not file recusal motions as soon as the fact forming the basis of the motions are known. *Davis v. Tenn. Dep't of Empl. Sec.*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999). We find this issue has been waived.

III. EXCLUSION OF AUDIO AND VIDEO TAPES

The trial judge excluded from evidence numerous audio and video tapes surreptitiously taken by the husband in an effort to portray the wife as an alcoholic and to support his allegations that wife consumed alcoholic beverages in the presence of the party's minor child. The basis of the trial court's exclusionary ruling was the failure of husband to timely and truthfully disclose these tapes. Only one video tape was made an exhibit. This exhibit was entered *sua sponte* by the trial court after its review. The husband conceded that the tape did not reveal that the wife consumed an alcoholic beverage. The husband failed to make an offer of proof regarding the substance of the excluded tapes. When a trial court excludes evidence, the party offering such evidence must make and offer of proof to inform the appellate courts what "the substance of the evidence" was to be. Tenn R. Evid. 103 103(a)2. When it is a document or exhibit, this is done simply by having the exhibit marked for identification. *St. v. Goad*, 707 S.W.2d 846, 852-53 (Tenn. 1986). The husband failed to make an offer of proof and thus waived this issue.

III. GROUNDS FOR DIVORCE

At trial, the wife testified about husband's fits of anger, failure to communicate, and increasing sexual aggressiveness. During the period of reconciliation, the trial court found that husband took secret video and audio tapes of his wife; accused her of alcoholism; attempted to have her investigated for driving under the influence; and refused to take her to the doctor. The record fully supports the trial court's award to the wife on the grounds of inappropriate marital conduct.

IV. PRIMARY RESIDENTIAL PARENT

The trial court designated wife as the primary residential parent and primary decision maker of the party's minor child. This Court reviews a trial court's custody determination under an abuse of discretion standard. *Herrera v. Herrera*, 944 S.W.2d 379, 385 (Tenn. Ct. App. 1996), thus, this Court must uphold a trial court's ruling "so long as reasonable minds can disagree as to the propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Id.* When reviewing a trial court's discretionary decision this Court "begins with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision." *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999). When devising custody determinations, the trial court engages in a comparative fitness analysis. *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996). Section 36-6-106 Tennessee Code Annotated provides:

(a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child.

During the marriage, the wife has been the primary caretaker and has been involved with the child's activities and church. She has tried to foster a good relationship between the child and husband. The husband has failed to communicate with the wife on parenting issues. The husband engaged in a systematic scheme to brand his wife as an alcoholic. The husband has had a stormy relationship with the children of his prior marriage. Dr. Jay Woodman, the custody expert, concluded that the wife exhibited no signs of alcohol addition and expressed concerns about the parties ability to cooperate with co-parenting. We have reviewed the record and find no abuse of discretion in the trial court's designation of the wife as the primary residential parent.

The husband also complains that the trial court erred in failing to award husband joint custody and equal parenting time. Joint custody arrangements are appropriate in certain limited circumstances. *Gray v. Gray*, 885 S.W.2d 353, 355 (Tenn. Ct. App. 1994). However, while authorized by statute, joint custody arrangements are generally disfavored by the courts of this state due to the realization that such arrangements rarely serve the best interest of the child. *Malone v. Malone*, 842 S.W.2d 621, 623 (Tenn. Ct. App. 1992).

The record reveals a heightened level of distrust of the wife by husband and is replete with the difficulties experienced by the parties in their efforts to communicate. Dr. Woodman opined

that co-parenting would be difficult. We find the trial court did not abuse its discretion in denying joint custody.

VI. DIVISION OF THE MARITAL ESTATE

The trial court is charged with equitably dividing, distributing, or assigning the marital property in “proportion as the court deems just.” Tenn. Code Ann. § 36-4-121-(e)(1); *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn. 2004). The court is to consider all relevant factors in its distribution: Tenn. Code Ann. § 36-4-121(e) lists the factors to be considered by the trial court. The court may consider any other factor necessary in determining the equities between the parties, Tenn. Code Ann. § 36-4-121(e)11, except that the division is to be made without regard to marital fault. Appellate courts ordinarily defer to the trial court’s decision unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(e) or is not supported by a preponderance of the evidence. *Jolly*, 130 S.W.3d at 785-86.

The trial court accepted the wife’s evaluation of the marital estate. This evaluation was \$141,197.77, of which husband was granted assets totaling \$103,383.77. The wife is 39 years of age and the husband is 52 years old. The marriage lasted 6 years. Both parties are in good health. During the marriage both parties contributed to the marital estate. The husband has a separate estate of approximately \$476,000.00. The husband’s income is greater than the wife’s. The wife was awarded marital assets totaling \$37,814.00. The wife’s economic circumstances place her at a disadvantage when compared to the husband’s circumstances. The evidence does not preponderate against the finding of the trial court.

V. MARITAL DEBT

Husband was ordered to pay the Bank One Visa debt in the amount of \$2,024.20. In allocating marital debts, the trial court should consider the following four factors: (1) the debt’s purpose; (2) which party incurred the debt; (3) which party benefitted from incurring the debt, and (4) which party is best able to pay the debt. *Alford v. Alford*, 120 S.W.3d 810, 814 (Tenn. 2003); *Goodman v. Goodman*, 8 S.W.3d 289, 298 (Tenn. Ct. App. 1999). The wife testified that the credit card was used by both parties for household expenses and personal expenses. Each month husband required the wife to divide the personal charges and be responsible for payment of her portion. After the separation, the husband cancelled the card and did not make any payments. The debt was incurred by both parties, and each party benefitted. The husband is best able to pay the debt. Accordingly, judgement of the trial court is affirmed.

VI. JUDGMENT FOR DAMAGE TO PROPERTY

The trial court awarded wife a judgment in the amount of \$1,225.00 for damage to personal property that belonged to the wife and was destroyed by husband after the wife left the marital residence. We have reviewed the record and find that this award is supported by the evidence.

VII. ALIMONY

The trial court awarded the wife \$1,000.00 per month for 36 months as transitional alimony. The trial court further ordered alimony *in solido* in the amount of \$20,000.00.

There are no hard and fast rules for spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998). “Whether an alimony award is appropriate is dependent on the facts and circumstances of each case.” *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002). Due to the factually driven nature of the decision, the court must weigh numerous factors including those set forth in Section 36-5-101(d)E of the Tennessee Code. *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989). “The trial court has broad discretion in determining the type, amount and duration of alimony based upon the particular facts of each case.” *Sullivan*, 107 S.W.3d at 511 (citing *Kinard v. Kinard*, 986 S.W.2d 220 (Tenn. Ct. App. 1998)). We review matters of alimony under an abuse of discretion standard. If the discretionary decision is within the range of acceptable alternatives, appellate courts will not substitute their decision for that of the trial court simply because the appellate court would have chosen a different alternative. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 224 (Tenn. Ct. App. 1999).

Husband asserts that wife did not specifically request alimony in her prayer for relief in her complaint. This assertion overlooks that wife’s original complaint prayer for relief stated “that the wife be awarded alimony, both *pendente lite* and permanent.” In wife’s answer to husband’s counter-complaint, wife specifically requested that she be awarded “rehabilitative alimony, transitional alimony, alimony *in solido*.” Further, wife’s original complaint contained a prayer for general relief. “The rule is well settled in this state that under a prayer for general relief the court may grant any other and different relief specifically indicated and prayed for which is justified by the pleadings.” *Aaron v. Aaron*, 909 S.W.2d 408, 412 (Tenn. 1995). This argument is without merit.

The trial court found that the wife had the financial needs and the husband had the ability to pay an award of alimony. The trial court further found husband to have a greater earning capacity than wife. We have already discussed the economic factors of the parties concerning the division of the marital estate. The wife’s monthly income and expense statement reflects that her expenses exceed her income by \$1,300.00. When the wife left the marital residence, she was forced to incur debts to establish another household for herself and the minor child. The purpose of spousal support is to aid the disadvantaged spouse to become and remain self sufficient, and when economic rehabilitation is not feasible, to mitigate the harsh realities of divorce. *Anderton v. Anderton*, 988 S.W.2d at 682 (citing *Shackleford v. Shackleford*, 611 S.W.2d 598, 601 (Tenn. Ct. App. 1980)).

Transitional alimony means a sum of money payable by one party to, or on behalf of, the other party for a determined period of time. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce. Tenn. Code Ann § 36-5-121(g)(1). The recipient spouse’s need and obligor spouse’s ability to pay are the primary considerations in determining

whether alimony is warranted in a given case. *Bratton v. Bratton*, 136 S.W.3d 595, 604 (Tenn. 2004).

The record clearly indicates an award of transitional alimony is appropriate. The wife has financial needs each month beyond her ability to pay. The trial court found that the husband has the assets to pay. We agree with this finding. The trial court did not abuse its discretion in awarding transitional alimony.

In addition, we find that the trial court's award of alimony *in solido* in the amount of \$20,000.00 to be supported by the evidence. This award, plus the assets received by wife as a result of the division of the marital estate, will allow the wife to receive approximately \$95,000.00 as a result of this divorce. This award will offset much of the debt incurred by the wife after she left the marital residence.

VIII. INSURANCE

The husband was ordered to maintain hospitalization, major medical, and dental insurance for 36 months. Tennessee Code Annotated § 36-5-121(j) provides for an award of this nature. The wife has this need and the husband has the ability to meet the obligation. We find that this award is supported by the record.

IX. ATTORNEY FEES

The trial court ordered husband to pay \$75,000.00 in attorney fees. This amount was based upon the affidavit of attorney fees filed by wife's attorney. Generally, an award of attorney fees in a divorce case is considered as alimony or spousal support, generally characterized as alimony *in solido*. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002); *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). Because attorney fees are considered alimony or spousal support, an award of such fees is subject to the same factor that must be considered in the award of any other type of alimony. *Yount*, 91 S.W.3d at 783. The most important factors are the real need of the disadvantaged spouse, a demonstrated financial inability to obtain counsel, and the ability of the obligor spouse to pay. *Miller*, 81 S.W.3d at 775. Consequently, a spouse with adequate property and income is generally not entitled to an award of additional alimony to compensate for attorney fees and expenses, depending on all relevant factors. *Wilder v. Wilder*, 66 S.W.3d 892, 895 (Tenn. Ct. App. 2001).

In awarding attorney fees the trial court reasoned that the wife had been forced to put up an extraordinary defense to rebut the allegation made by husband regarding her fitness as a parent. The trial court felt that wife had to spend an exorbitant amount of fees that were unnecessary. We agree with the trial court's findings that the husband's strategy caused the wife to vigorously defend husband's allegation. However, in reviewing the entire record, it is difficult not to conclude that the trial court was, to some degree, basing his award of attorney fees on his findings that husband's allegations were groundless and inspired by malice toward the wife. Also, the trial judge made no

findings regarding the wife's ability to pay her legal expenses. Without this finding, we conclude that the trial court abused its discretion in awarding attorney fees to the wife. Accordingly, we vacate the trial court's award of attorney fees and remand to the trial court for a hearing to determine the appropriateness of an award, if any, of reasonable attorney fees to the wife.

The wife seeks an award of attorney fees for defending the issues raised by husband on appeal. The wife asserts that the issues so raised were groundless and without merit. We agree. On remand, the trial court is to also determine the appropriateness of an award, if any, of attorney fees to the wife for defending the issues raised on appeal.

Finally, the trial court permanently enjoined and restrained the husband from making false reports about the wife to law enforcement authorities. Tennessee Code Annotated § 39-16-502 makes it unlawful for any person to make a false report or statement to a law enforcement officer. Therefore, there is an adequate remedy available should the husband make a false report concerning the wife.

Conclusion

In conclusion, we vacate that portion of the judgment permanently restraining and enjoining the husband from making false reports to law enforcement concerning the wife. We vacate the trial court's award of attorney fees and remand to the trial court for a hearing to determine the appropriateness of an award, if any, of reasonable attorney fees to the wife. We find that issues raised on appeal were groundless and without merit and remand for a determination by the trial court of the appropriateness of an award of attorney fees to the wife, if any, for defending the issues on appeal. In all other respects we affirm the judgment of the trial court. The cost of this appeal is taxed to the husband.

JON KERRY BLACKWOOD, SENIOR JUDGE